91-1500

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

GLENN M. SHRIVER,
Petitioner

GAF CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action brought to recover for personal injuries caused by negligence suffered within the boundaries of a federal enclave ceded by a State to the United States, does 16 U.S.C. Section 457 require the Court to apply the statute of limitations of the State surrounding the federal enclave and the rules of that surrounding State pertaining to tolling of the statute and when a cause of action accrues?

2. Are statutes of limitation substantive or procedural within the context of 16 U.S.C. Section 457?

3. Is Petitioner's action for personal injuries, brought under 16 U.S.C. Section 457, time-barred by the applicable statute of limitations?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Glenn M. Shriver, and the respondent, GAF Corporation.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner, Glenn M. Shriver, respectfully prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit, entered

in the above entitled proceeding on November 7, 1991. On December 4, 1991 said Court of Appeals denied Petitioner's request for Rehearing.

OPINIONS BELOW

The Judgment Order of the Court of Appeals for the Third Circuit dated November 7, 1991 has not been reported. It is reproduced in Appendix "A" hereto.

The Order of the Court of Appeals for the Third Circuit dated December 4, 1991, denying Rehearing, has not been reported. It is reproduced in Appendix "B" hereto.

The Opinion of the United States District Court for the Middle District of Pennsylvania dated April 24, 1991 has not been reported. It is reproduced in Appendix "C" hereto.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution: Article 1, Section 8, Clause 17

The Congress shall have the Power to exercise Legislation in all Cases whatsoever, over such District (no exceeding ten miles square) as may, by Cessation of particular States, and the acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock Yards and other needful Buildings.

16 U.S.C. Section 457

In the case of the death of any person by neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be, and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

Maryland Code (1984), Section 5-101 of the Courts and Judicial Proceeding Article

A civil action at law shall be filed

within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

42 Pa. C.S.A. Section 5524(2)

The following actions and proceedings must be commenced within two years:

An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful death or neglect or unlawful violence or negligence of another.

Uniform Conflict of Laws-Limitations Act, 12 U.L.A. (1991 Supplement, pages 59-62)

Section 1 Definitions

As used in this [Act]:

(1) "Claim" means a right of action that may be asserted in a civil action or proceeding and includes a right of action created by statute.

(2) "State" means a state, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a foreign country, or a political subdivision of any of them.

Section 2 Conflict of Laws; Limitation Period

(a) Except as provided by Section 4, if a claim is substantively based:

(1) upon the law of another state, the limitation period of that state applies; or

(2) upon the law of more than one state, the limitation period of one of those states chosen by the law of conflicts of laws of this state, applies.

(b) The limitation period of this State applies to all other claims.

Section 3 Rules Applicable to Computation of Limitation Period

If the statute of limitations of another state applies to the assertion of a claim in this state, the other state's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period, but its statues and other rules of law governing conflict of laws do not apply.

Section 4 Unfairness

If the Court determines that the limitation period of another state applicable under Sections 2 and 3 is substantially different from the limitation period of this State and has not afforded a fair opportunity to sue upon, or imposes unfair burden in defending against the claim, the limitation period of this State applies.

Section 5 Existing and Future Claims

This [Act] applies to claims:

(1) accruing after the effective date of this [Act]; or

(2) asserted in a civil action or

proceeding more than one year after the effective date of this [Act], but it does not revive a claim barred before the effective date of this [Act].

Section 6 Uniformity of Application and Construction

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

Section 7 Short Title

This [Act] may be cited as the Uniform Conflict of Laws - Limitations Act.

Section 8 Severability

If any provision of this [Act] or application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or other applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

Section 9 Repeal

The following acts and parts of acts are repealed:

(1)

(2)

(3)

Section 10 Time of Taking Effect

This [Act] shall take effect on _____

_____

Federal Rules of Civil Procedure No. 41(b)
INVOLUNTARY DISMISSAL: EFFECT THEREOF.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence the defendant, without waiving the right to offer evidence in the event that the motion is not granted, may move for dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than dismissal for lack of jurisdiction, for improper venue or for failure to join a party under Rule 19 operates an adjudication upon the merits.

STATEMENT OF THE CASE

At all times material hereto, Petitioner, Glenn M. Shriver, was employed by the United States Army as a civilian employee at Fort Ritchie, Maryland, where he performed the duties of a graphic illustrator. The land within Ft. Ritchie was ceded to the United States by the State of Maryland.

Shriver is a Vietnam Veteran. Like many Vietnam Vets, Shriver's Vietnam experience left him with certain psychological disorders that have been variously diagnosed as depression, anxiety, panic attacks, paranoia and schizoid behavior, and post traumatic stress disorder. Notwithstanding these psychological problems, prior to March 5, 1984, Shriver was always able to perform his duties of a graphic illustrator and perform them well.

Shriver's duties as a graphic illustrator required that he regularly use or be in the vicinity of an Ozalid copy machine that is manufactured and/or distributed by Respondent

GAF Corporation. This Ozalid copy machine utilizes anhydrous ammonia in the copying process. During the copying process, the Ozalid machine normally gives off ammonia fumes.

On March 5, 1984, while Shriver was attempting a changeover of cylinders on an Ozalid copy machine, at his work place, a pressure valve malfunctioned, leading to a release of an unknown amount on anhydrous ammonia into a closed environment. Shriver was exposed to ammonia in that environment for between 1.5 to 2 hours, as he attempted to repair the leak.

As a result of that acute exposure to ammonia Shriver sustained lung irritation. Shriver was off work for about a month and returned to his employment around April 7, 1984 after his doctor found that this lung condition had resolved.[1]

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[1] On December 18, 1985, the United States Department of Labor, Office of Worker's Compensation Programs, notified Shriver:

"This office has accepted that you sustained chemical pneumonitis/bronchitis due to your

(footnote continued on next page)

Problems of a more serious nature, and which are the subject of this proceeding, arose after Shriver returned to work. Over the next two years, while Shriver was working near Ozalid copy equipment, Shriver experienced recurrent episodes of headaches, light-headedness, runny nose, eye burning, itchiness, nausea, and burning pain in his chest. Shriver had great difficulty in staying at work and in December of 1986 he resigned his employment with the Army at the recommendation of his personal physician because of the determination of his health.

Shriver sought medical treatment from numerous doctors who were unable to establish the cause of Petitioner's post April 7, 1984 symptoms. That cause did not become known to

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exposure to ammonia vapors on March 5, 1984. <u>However, the medical evidence indicates this condition resolved on or about April 7, 1984.</u> This determination was based on the fact that there was no documented evidence of respiratory problems on the doctor visit on or about April 7, 1984, and the respiratory testing in 1985 failed to confirm damage." (emphasis added) (Third Circuit Appendix, p. 172a)

Shriver until some time after April 19, 1988, when he received a copy of a medical report from Dr. Julio C. Rivera, Chief of Occupational Medicine at the Wyman Park Medical Center (Johns Hopkins University) [Third Circuit Appendix, pp. 5a, 8a-23a)[2]

Dr. Rivera states:

> "As you can see from our impression, although we do not feel that he [Shriver] has developed allergies to the chemicals he worked with, we do feel that he developed a non-immunologically-based hypersensitivity to these chemicals. This is triggered by the smell of ammonia and other chemicals with strong odors. We feel that this hypersensitivity developed as a result of his acute, uncontrolled exposure to ammonia in March of 1984, and is intimately related to Shriver's underlying psychiatric diagnoses. Indeed, we feel that his acute, uncontrolled, high dose exposure to ammonia followed by the repeated, intermittent, lower-dose exposures have exacerbated his psychiatric condition." (emphasis added) (Id. at 8a)

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[2] The date on Dr. Rivera's transmittal letter (Third Circuit Appendix, p. 8a) is wrong. It should be April 17, 1988. On p. 9a of the Third Circuit Appendix, the Court will find that the date of Dr. Rivera's report was April 10, 1988 and the date of Shriver's Initial Evaluation at Wyman Park Medical Center was on January 6, 1988.

Dr. Rivera further stated:

> "***It is Mr. Shriver's behavioral response to these irritant exposures that distinguish him from his fellow workers and that relate to his sensitivity.
>
> It is not unusual for individuals who experience acute, uncontrolled exposure to industrial chemicals to develop psychiatric symptomatology following the exposure. This was first described following ammonia exposures in 1938 where 2/6 reported cased had anxiety symptoms persisting for extended periods of time following the exposure. Such symptomatology frequently meets the diagnostic criteria for post-traumatic stress disorder." (Third Circuit Appendix, p. 17a)

Dr. Rivera's diagnosis was confirmed by Dr. C. F. Fuhrmann, Chief of Respiratory Medicine at South Baltimore General Hospital, Baltimore, Maryland. At relevant part in his report of September 27, 1988 (Third Circuit Appendix, pp. 24a-32a) Dr. Fuhrmann states:

> "In my own practice I am currently following two patients who have developed hypersensitivity to ammonia fumes when utilizing the same piece of equipment

> involved in this claim,[3] one is an employee of the manufacturer and the other is an end user. There is no literature that specifically describes exposure to ammonia and the development of allergy. I would concur with the report of Dr. Rivera that we are not dealing with a true allergy in this case, but in fact hypersensitivity. In my experience as an occupational physician I have seen numerous cases of individuals who have been exposed to fumes who later on developed a generalized 'hypersensitivity' to other fumes and strong odors. Again this does not represent allergy but seems to represent some poorly understood pathologic mechanism. In the case of Mr. Shriver this sensitivity and the reaction that it causes manifests itself in a very strong psychosomatic condition. ****" (Id. at p. 27a) (emphasis added)

Based upon the medical reports of Dr. Rivera and Dr. Fuhrmann, which document that:

1. Shriver's post-April 7, 1984 symptoms were caused by a hypersensitivity to ammonia;

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[3] The claim to which Dr. Fuhrmann was referring was a new request for Worker's Compensation benefits made by Shriver based upon a report of Dr. Rivera. All previous requests for benefits for post-April 7, 1984 symptoms had been denied by the Office of Worker's Compensation Programs because Shriver could not prove causality between his post-April 7, 1984 symptoms and his work environment. The Office of Worker's Compensation Programs retained Dr. Rivera to perform an independent evaluation.

2) It is not unusual for individuals who experience acute uncontrolled exposure to industrial chemicals to develop psychiatric symptomology following the exposure;

3) Such reaction was first described in 1938; and

4) Dr. Fuhrmann is treating other individuals who have developed hypersensitivity to ammonia fumes while utilizing this very same Ozalid copy machine;

Petitioner Shriver formed a belief that Respondent GAF Corporation knew or should have known about the dangers of hypersensitivity.

Hence, on April 17, 1990, Petitioner Shriver filed the within Complaint against GAF Corporation based upon breach of alleged duties to warn. Paragraph 28 of Shriver's Complaint provides:

> "28. The aforesaid injuries suffered by the Plaintiff were the direct and proximate result of Defendant's negligence, which consisted of the following breaches of duty:
>
> a. In failing to provide adequate warning to Plaintiff and/or his employer

about the dangers of developing a hypersensitivity to the smell of ammonia, or to the strong odor of other chemicals, from acute uncontrolled exposure to ammonia fumes;

b. In failing to provide adequate warning to Plaintiff and/or his employer of the dangers of all further exposures to the smell of ammonia fumes in any amount, or to the strong odor of other chemicals, where such hypersensitivity to ammonia fumes has developed;

c. These duties to warn of the aforesaid dangers continued after the Ozalid copy machines were sold by Defendant to Plaintiff's employer." (Third Circuit Appendix, p. 6a)

The jurisdictional basis of Shriver's Complaint was federal question jurisdiction under 28 U.S.C. Section 1331 because the action arose under the laws of the United States, i.e. 16 U.S.C. Section 457. (Third Circuit Appendix, p. 2a) Alternative jurisdiction was asserted under 28 U.S.C. Section 1332 because of the diversity of citizenship of the parties. (Id.)

On or about June 28, 1990 GAF Corporation filed its Answer to Petitioner's Complaint wherein it alleged that "[Petitioner's] claims

are barred by the applicable statute of limitations." (Third Circuit Appendix, p. 42a)

GAF Corporation's Answer did not mention what statute of limitations was applicable to Shriver's Complaint. However, on or about February 28, 1991, Respondent filed a Motion for Summary Judgment wherein the only issue raised was whether Petitioner's claim was time-barred by Pennsylvania's two year statute of limitations.[4] (Third Circuit Appendix, pp. 45a-47a)

Shriver has consistently maintained in the District Court and before the Court of Appeals that, because of 16 U.S.C. Section 457, Pennsylvania law is inapplicable to this proceeding; and that Petitioner's rights are governed by Maryland's three year statute of limitations[5] and the rules of Maryland pertaining to when the statute of limitations begins to run and when a cause of action accrues.

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[4] 42 Pa. C.S.A. Section 5524(2)

[5] Maryland Code (1984), Section 5-101 of the Courts and Judicial Proceedings Article

On April 24, 1991 the Federal District Court issued a Memorandum and Order granting Respondent's Motion for Summary Judgment against Petitioner. In its decision the District Court acknowledged that because Shriver was injured on federal property, 16 U.S.C. Section 457 required it to apply the substantive law of Maryland to the case. The Court refused to apply the Maryland statute of limitations because of Maryland precedent which holds that statutes of limitation are procedural. (Appendix "C" hereto, pp. C-2 to C-3) [Citing Dougherty v. Prettyman, 219 Md. 83, 148 A. 2d 438 (1959)]

After a lengthy discussion of Pennsylvania law, the District Court held that Petitioner's Complaint was time-barred under Pennsylvania's two year statute of limitations. (Appendix "C" hereto, pp. C-6 to C-20) Although neither GAF's Answer nor its Motion for Summary Judgment raised Maryland's statute of limitations, the District Court misapplied Maryland law and found that Shriver's Complaint was also time-barred

under Maryland's three year statute of limitations. (Appendix "C" hereto, p. C-21)

This misapplication consisted of not properly following Maryland rules for determining when a civil claim accrues and when the statute begins to run.

On May 23, 1991 Shriver gave notice that this Order and Judgment was being appealed to the United States Court of Appeals for the Third Circuit. The jurisdictional basis of that appeal was 28 U.S.C. Section 1291 because the District Court's Order granting Summary Judgment in favor of GAF Corporation was a final Order.

On November 7, 1991 the United States Court of Appeals for the Third Circuit issued a Judgment Order affirming the Judgment of the District Court "for the reasons set forth in the opinion of the district court." (Appendix "A" hereto, p. A-2) On November 19, 1991 Shriver filed a Petition for Rehearing under Fed. R.A.P. 40. On December 4, 1991, the Court of Appeals denied Rehearing. (Appendix "B" hereto)

REASON FOR GRANTING THE WRIT

The Writ should be issued because the decision of the District Court, which was affirmed by a Judgment Order of the United States Court of Appeals for the Third Circuit, presents important issues of federal/state relations which have never before been decided by this Court or any United States Court of Appeals and these issues should be settled now by this Court. The only Court, other than the District Court below, which has ruled on any of these issues is the United States District Court for the District of Connecticut, which held that, because 16 U.S.C. Section 457 does not contain an express limitation period for enforcement of actions brought pursuant to that statute, the statute of limitations of the forum state must apply. Quadrini v. Sikorski Aircraft Div. United Aircraft Corp., 425 F. Supp. 81, 90 (D. Conn. 1977)

Shriver contends that the Quadrini decision is erroneous because 16 U.S.C. Section 457

assimilates the statute of limitations of the state surrounding the federal enclave. The District Court below rejected this contention, noting that Maryland characterizes its statutes of limitation as procedural. (Appendix "C" hereto. pp. C-2 to C-3) However, in Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 1470, 89 L. Ed. 2079 (1945) this Court said that it is irrelevant whether a State characterizes its statute of limitations as "substantive" or "procedural," and held that statutes of limitations are substantive under federal law.

In particular the decision below is contrary to Engel v. Davenport, 271 U.S. 33, 46 S. Ct. 410, 70 L. Ed. 813 (1926), which holds that where one statute incorporates by reference the provisions of another law, the assimilation includes the statute of limitations that applies to that other law.

Furthermore, the decision below is contrary to Fed. R. Civ. P. 41(b), which states in

relevant part: "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than dismissal for lack of jurisdiction, for improper venue, or failure to join a party under Rule 19, operates as an adjudication upon the merits." (emphasis added)

In these United States there exist numerous federal enclaves like Ft. Ritchie, Maryland. Article 1, Section 8, Clause 17, of the United States Constitution grants to the United States "exclusive legislation" over forts, magazines, arsenals, dockyards, and other needful buildings, when lands therefore are acquired with the consent of the legislature of the state of their situs. Exclusive "legislation" has been construed to mean exclusive "jurisdiction" in the sense of exclusive sovereignty. Surplus Trading Co. v. Cook, 281 U.S. 647, 652, 50 S. Ct. 455, 74 L. Ed. 1091 (1930)

After the cession of jurisdiction to the

United States the laws of the state not inconsistent with the transfer are still vital to fix the private rights of persons in the ceded area; but they lose their character as laws of the union. Stokes v. Adair, 265 F. 2d 662, 665 (4th Cir. 1959), cert. denied 361 U.S. 816, 80 S. Ct. 56, 4 L. Ed. 2d 62; Mater v. Holley, 200 F. 2d 123, 124 (5th Cir. 1952); Macomber v. Rose, 401 F. 2d 545, 546 (9th Cir. 1968) Rights arising under such assimilated law arise under federal law and are properly the subject of federal jurisdiction. Macomber v. Rose, 401 F. 2d at 546; Mater v. Holley, 200 F. 2d at 125; Stokes v. Adair, 265 F. 2d at 665-666

Only the state laws in effect at the time of the transfer of jurisdiction continue in effect and subsequent statutes of the state are not part of the laws of the ceded area unless Congress takes action to keep them current. Stokes v. Adair, 265 F. 2d at 665 16 U.S.C. Section 457 was passed by Congress to provide for uniformity between the law of the federal

enclave and the law of the surrounding state in matters involving wrongful death and personal injury and to permit that federal law to evolve concomitantly with changes in state law. James Stewart & Co. v. Sadrakula, 309 U.S. 94, 100, 60 S. Ct. 431, 84 L. Ed. 596 (1940); Stokes v. Adair, 265 F. 2d at 665; Vasina v. Grumman Corp., 644 F. 2d 112, 117 (2nd Cir. 1981); Ferebee v. Chevron Chemical Co., 736 F. 2d 1529 (D.C. Cir. 1984)

Considering all of the military bases, national parks, national forests, and other federal enclaves that exist in this country, there is a great potential for law suits to be brought involving wrongful death or personal injury that occur on such enclaves. It is, therefore, somewhat surprising that there has been only one other case brought under 16 U.S.C. Section 457, where the Court has had to decide whether the statute of limitations of the forum or the statute of limitations of the state surrounding the enclave applied to that action.

In Quadrini v. Sikorski Aircraft Div. United Aircraft Corp., 425 F. Supp. at 90 the District Court in an action brought under 16 U.S.C. Section 457 applied the statute of limitations of the forum state, holding that "Generally, when Congress has created a federal right but not prescribed a period for its enforcement, federal courts will borrow the most closely analogous statute of limitations of the state in which the federal court sits." (Citing Johnson v. Railway Express Agency, 421 U.S. 454, 462, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975) and other cases) We do not quarrel with the holding of the Johnson case. We, however, believe that its principle is inapplicable to a case brought pursuant to 16 U.S.C. Section 457.

In Engel v. Davenport, 271 U.S. at 38, 46 S. Ct. at 412-13 this Court held that where Congress has passed a new law which incorporates by reference rights granted by other law, the statute of limitations which pertains to enforcement of the new legislation is the

statute of limitations applicable to the assimilated law.

The Engel decision involved interpretation of Section 33 of the Merchant Marine Act of 1920,[6] which read:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages, with the right of trial by jury, and in such action all statutes modifying the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action, all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable."

Engel brought his action for personal injury in the Superior Court of California. His Employer contended that the case was time-barred under California's one (1) year statute of limitations for personal injury caused by wrongful act or negligence. This Court rejected

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[6] 46 U.S.C. Section 688

application of the statute of limitations of the forum state and instead applied Section 6 of the Employer's Liability Act,[7] which stated "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

The reason given by this Court for applying Section 6 of the Employer's Liability Act was:

> "This provision is one of substantive right, setting a limit to the existence of the obligation which the Act creates. And it necessarily implies that the action may be maintained, as a substantive right, if commenced within two years.
>
> The adoption of an earlier statute by reference, makes it as much a part of the latter act as though it had been incorporated at full length. It brings into the latter act all that is fairly covered by the reference, that is to say, all of the provisions of the former act, which from the nature of the subject matter, are applicable to the latter act. It is clear that the provision of the Employer's Liability Act as to the time in which a suit may be instituted, is directly applicable to the subject matter of the Merchant Marine Act and covered by the reference. In the Panama Railroad Case, p. 392, it was held that the contention that the Merchant Marine Act

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[7] 45 U.S.C. Section 56

did not possess the uniformity in operation essential to its vitality, was unfounded, since the Employer's Liability Act which it adopted, had a uniform operation, which could not be defected from 'by local statutes or local views of common law rules.' The period of time within which an action may be commenced is a material element in such uniformity of operation. And, plainly, Congress in incorporating the provisions of the Employer's Liability Act into the Merchant Marine Act did not intend to exclude a provision so material, and to permit the uniform operation of the Merchant Marine Act to be destroyed by the varying provisions of the state statute of limitations.

We conclude that the provisions of Section 6 of the Employer's Liability Act relating to the time of commencement of the action, is a material provision of the statutes 'modifying or extending the common law right or remedy in cases of personal injury to railway employees' which was adopted by and incorporated in the Merchant Act. And, as a provision affecting the substantive right created by Congress in the exercise of its paramount authority in reference to the maritime law, it must control an action brought in a state court under the Merchant Marine Act, regardless of any statute of limitations of the State." (citations omitted) 271 U.S. at 39; 46 S. Ct. at 412-13

There is great similarity between 16 U.S.C. Section 457 and Section 33 of the Merchant

Marine Act of 1920:

1. Both Acts involved the same subject matter -- suits involving wrongful death and personal injury.

2. Both statutes incorporate by reference other law. The Merchant Marine Act incorporated the law pertaining to railroad employees. 16 U.S.C. Section 457 incorporates the law of the state surrounding the federal enclave.

3. Both statutes have goals of uniformity. The Merchant Marine Act reflects an intent of Congress that suits brought by merchant seamen shall be treated the same as suits brought by railroad employees. 16 U.S.C. Section 457 reflects an intent of Congress that the law of the federal enclave in cases involving wrongful death and personal injury shall be uniform with the law of the state surrounding the federal enclave.

4. Neither the Merchant Marine Act of 1920 nor 16 U.S.C. Section 457 expressly contain a

statute of limitations.

The sole difference between the Merchant Marine Act and 16 U.S.C. Section 457 is that the Employer's Liability Act, which was assimilated by the Merchant Marine Act, contained an express two year statute of limitations; whereas Maryland's three (3) year statute of limitations is not contained in any Maryland legislation creating a right to bring wrongful death or personal injury actions. We do not believe this difference to be significant.

Acceptance of GAF's argument that the statute of limitations of the forum state must apply in cases brought under 16 U.S.C. Section 457 will defeat the goal of uniformity required by that Act.

For example, suppose personal injury or wrongful death occurs at a federal enclave located in Pennsylvania and suit is brought in Maryland more than two, but less than three, years after the cause of action accrues. Under GAF's theory, the suit would be permitted in

Maryland notwithstanding the fact that the action would be time-barred if filed in Pennsylvania, the state which surrounds the enclave.

Conversely, assume that personal injury or wrongful death occurs at a federal enclave located in Maryland and suit is brought in Pennsylvania more than two, but less than three, years after the cause of action accrues. Under GAF's theory the suit would be dismissed in Pennsylvania as time-barred even though the action would be permitted if filed in the Courts of Maryland.

GAF's theory must be rejected because:

1) It causes a result that is different than the result that would have been reached if the law of the state surrounding the federal enclave were applied;

2) It encourages "forum shopping", and

3) Fed. R. Civ. P. 41(b) treats the dismissal of an action because of the statute of

limitations as a judgment on the merits.[8] PRC Harris Inc. v. Boeing Corp., 700 F. 2d 894, 896 (2nd Cir. 1983); Shoup v. Bell & Howell Co., 872 F. 2d 1178, 1180 (4th Cir. 1989); Nilsen v. City of Moss Point, Miss., 701 F. 2d 556, 562 (5th Cir. 1983); Nathan v. Rowan, 651 F. 2d 1223, 1226 (6th Cir. 1981); Cemer v. Marathon Oil Co., 583 F. 2d 830, 832 (6th Cir. 1978)

In Shoup v. Bell & Howell Co., supra, the plaintiffs filed a personal injury action in Pennsylvania that was dismissed by a Federal District Court because it was time-barred under Pennsylvania's two year statute of limitations.[9] Thereafter, the plaintiffs filed an identical action in federal court in the District of Maryland. Even though the action was timely

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[8] "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or failure to join a party under Rule 19, operates as an adjudication upon the merits." (emphasis added)

[9] See footnote 4, supra.

recommenced within Maryland's three year statute of limitations,[10] the Court of Appeals for the Fourth Circuit, citing Rule 41(b), held that the second suit was barred under the principle of res judicata.

Because Rule 41(b) effects the rights of the parties and operates as a dismissal on the merits, statutes of limitations must be considered substantive law.

Whether Maryland categorizes its statute of limitations as substantive or procedural is irrelevant. This Court has held that statutes of limitations are substantive. Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109-110, 65 S. Ct. 1464, 1470, 89 L. Ed. 2079 (1945)

Explaining why statutes of limitation must be treated as substantive in diversity cases, this Court stated:

> "It is immaterial whether statutes of limitations are characterized as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us.

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[10] See footnote 5, supra.

> Erie R. Co. v. Tompkins, was not an endeavor to formulate specific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between state and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of the citizenship of the parties the outcome of the litigation in the federal court should be substantially the same so far as the legal rules determine the outcome of a litigation, as it would if tried in a State Court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in federal court instead of a state court a block away, should not lead to a substantially different result.
>
> Plainly enough, a statute that would completely bar recovery in a suit if brought in a state court bears on a state created right vitally and not merely formally or negligibly. As to the consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow state law. **** (emphasis added) 326 U.S. at 109-110; 65 S. Ct. at 1470

Statutes of limitations are no less substantantive in actions brought under 16 U.S.C. Section 457. The only difference between a case brought under Section 457 and a case where jurisdiction rests upon diversity of citizen-

ship, is that Section 457 demands uniformity of result between the law of the federal enclave and the law of the surrounding state; whereas diversity jurisdiction requires uniformity of result between the law of the federal district where suit is brought and the law of the forum state.

In effect, 16 U.S.C. Section 457 operates similar to the Uniform Conflict of Laws - Limitations Act, 12 ULA (1991 Supplement, pages 59-62) Relevant portions of that Uniform Act provide:

Section 2 Conflict of Laws; Limitation Period

> (a) Except as provided by Section 4, if a claim is substantively based:
>
> (1) upon the law of one state, the limitation period of that state applies....
>
> * * * *"

Section 3 Rules Applicable to Computation of Limitation Period

> If the statute of limitations of another state applies to the assertion of a claim in this state, the other states's relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period...."

The Prefatory Note to the Uniform Conflicts of Laws - Limitations Act observes:

"Traditionally statutes of limitation have been characterized as 'procedural' for conflict of law purposes, so that the limitations periods prescribed by the forum state's laws were applied. The result was reached despite its substantive effect of determining which party won the lawsuit. Forum shopping by delay prone plaintiffs, or by their attorneys, with suits filed in states with long limitations periods, inevitably occurred.

One consequence was that the court developed some inexact 'exceptions' to the general rule; these included one that treated as 'substantive' any limitation period that was 'built into' the very statute, such as a wrongful death act, that created the cause of action sued on; another called the 'specificity test' that treated a limitations statute as 'substantive' if it was directed specifically to the sort of claim sued on; and possibly others less commonly employed. See Grossman, Statutes of Limitation and the Conflicts of Laws: Modern Analysis, 1980, Ariz. St. L. J. 1

Another consequence was that about three-fourths of the state [sic] enacted so-called 'borrowing statutes' which followed no regular pattern but required application of a limitation period other than the forum state's if some stated aspect of the cause of action occurred or was connected to another state. These borrowing statutes are often difficult to interpret and apply. They have been the

source of considerable judicial confusion.

> In 1957 the Conference promulgated a Uniform Statute of Limitations on Foreign Claims Act which was designed to replace these variant borrowing acts. [11] It achieved no general adoption and was officially withdrawn in 1978. The major difficulty with it was its abrupt harshness. It cut all sorts of Gordian knots by providing simply that the governing law, as between the law of the forum and the state 'where the claim accrued' should be the one that prescribed the shorter period - 'whichever bars the claim.' That turned out to be not acceptable. The present committee was set up to draft a different 'limitations borrowing statute.' The consensus was that limitations laws should be deemed substantive in character, like other laws that effect the existence of the cause of action asserted." (emphasis added)

This policy behind the Uniform Conflict of Laws - Limitations Act, that limitations laws should be deemed substantive because they effect the existence of the cause of action asserted is the same as the policy found in Guaranty Trust Co. of New York V. York, 326 U.S. at 109-110; 65 S. Ct. at 1470, which treats statutes of

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[11] Pennsylvania adopted the Uniform Statute of Limitations on Foreign Claims Act, 42 Pa. C.S.A. Section 5521, in 1976

limitations as substantive in cases of diversity of citizenship. That same policy must also treat statutes of limitations and rules pertaining to tolling and accrual as substantive in cases arising under 16 U.S.C. Section 457. A dismissal because of the statute of limitations in cases brought pursuant to 16 U.S.C. Section 457 has the same effect as a dismissal because of the statute of limitations in diversity of citizenship cases. Fed. R. Civ. P. 41(b)

PETITIONER'S CLAIM IS NOT TIME-BARRED UNDER MARYLAND'S THREE (3) YEAR STATUTE OF LIMITATIONS

Under the assimilated Maryland "discovery" rule a claim does not accrue in a products liability action until the plaintiff knows or should know he has a cause of action, i.e. when he knows or should know 1) he suffered injury; 2) the injury was caused by the defendant; and 3) there was manufacturer wrongdoing or product defect. Pennwalt Corp. v. Nasios, 314 Md. 433,

550 A. 2d 1155, 1167 (1988) A lengthy history of Maryland's discovery rule is set forth in that decision.)

The reason why Maryland starts its statute of limitations running only after a plaintiff discovers or should have discovered that he has a cause of action is for "judicial economy." 550 A. 2d at 1167

> "To hold otherwise we would encourage, indeed almost force, a person who is injured by a [product] to immediately file suit against a manufacturer without knowledge of manufacturer wrongdoing or a product defect, in order to prevent the statute of limitations from running. Injured persons would become plaintiffs against every possible party without knowledge of wrongdoing or product defect in hope such evidence would emerge. As a result, the court would be crowded with potentially frivolous claims. This result is not inconsistent with the unarguably sound position that unfounded claims should be discouraged. We believe it would be more efficient to allow the plaintiff the statutory period to bring suit from the time he discovers or should have discovered he has as cause of action. This rule would not encourage plaintiffs to suit too early and would prevent plaintiffs from bringing suit too late because they would be required to be diligent in their investigation. Thus, our judicial time would be most efficiently spent." Pennwalt Corp. v. Nasios, Id. (emphasis added)

Shriver's Knowledge of his Injury and its Cause

GAF Corporation argues that "The existence and, cause of Shriver's injuries were known from the very first day of the [March 5, 1984] accident. He knew of the fact of his injury, his over-exposure to ammonia, causing lung damage. He knew of the operative cause of his injury--over-exposure from the anhydrous ammonia in the GAF blue print copy machine. Likewise, he knew of the relationship between the cause and the injury." (GAF's Third Circuit Brief, p. 24)

The injury for which Shriver seeks damages, however, is not lung damage, but the development of a hypersensitivity to ammonia and the subsequent deterioration of his mental condition. Dr. Rivera observed that although Shriver had psychiatric problems before the 1984 accident, he was still able to do his work. (Third Circuit Appendix, p. 17a) In his April

19, 1988 letter to Dr. Farmer, Dr. Rivera states:

> "As you can see from our impression, although we do not feel that [Shriver] has developed allergies to the chemical that he worked with, we do feel that he has developed a non-immunologically-based hypersensitivity to these chemicals. This is triggered by the smell of ammonia and other chemicals with strong odors. We feel that this hypersensitivity developed as a result of his acute uncontrolled exposure to ammonia in March 1984, and is intimately related to Mr. Shriver's underlying psychiatric diagnosis. Indeed, we feel that his acute, uncontrolled, high dose exposure to ammonia followed by the repeated, intermittent lower-dose exposures have exacerbated his psychiatric condition." (emphasis added) (Third Circuit Appendix, p. 8a)

Thus, while it was the March 1984 accident that caused the hypersensitivity, it was the following, repeated, intermittent, lower dose exposures to ammonia over a two year period that exacerbated Shriver's mental condition.

Whether Shriver can now recover for the recently discovered hypersensitivity to ammonia and deterioration of mental condition depends upon Maryland law. 16 U.S.C. Section 457

The case of Pierce v. Johns-Mansville Sales Corp., 296 Md. 656, 464 A. 2d 1020, 1027 (1983) is controlling. In the Pierce case, Pierce contracted asbestosis from exposure to asbestos and later developed lung cancer. The Maryland Court rejected Johns-Mansville's contention that there was only one indivisible cause of action for all of the harms resulting from both asbestosis and lung cancer, which supposedly accrued on the date when Pierce discovered his asbestosis. The Court held that when exposure to asbestos initially results in the manifestation of asbestosis, and subsequentially results in the manifestation of lung cancer, a separate and distinct latent disease, and no tort recovery has been sought for the harm resulting from the asbestosis, a cause of action for the harm resulting from the lung cancer accrues when lung cancer is or reasonably should be discovered. 464 A. 2d at 1027

Here, there is no evidence that everyone who develops lung irritation as a result of exposure

to ammonia will develop a hypersensitivity to ammonia or a deterioration of mental condition. Hypersensitivity to ammonia and deterioration of mental condition are not a maturation of lung damage. There is no evidence that, if Shriver had not been re-exposed to ammonia after his initial high dose exposure, Shriver still would have sustained the exacerbation of his mental condition.

GAF Corporation cites several factors as evidence that Shriver knew or should have known that his problems were caused by exposure to ammonia.

First, there is the statement in Dr. Rivera's report that:

> "as with the previous physicians who have see him, we feel this predominant disorder is psychiatric and this should be adequately addressed." (GAF's Third Circuit Brief, p. 27)

While some doctors did treat Shriver for pre-existing mental problems, no doctor, prior to Dr. Rivera, informed Shriver that as a result of

the March 1984 accident he developed a hypersensitivity to ammonia and/or that as a result of this hypersensitivity subsequent, repeated, intermittent, lower dose exposures to ammonia were exacerbating his mental condition.

GAF Corporation has suggested that Dr. Snyder's report of September 26, 1986, made Shriver aware of his injuries and their cause. (GAF's Third Circuit Brief, p. 30) However, Dr. Snyder's report does not mention hypersensitivity to ammonia; does not address the mechanism whereby Shriver acquired a hypersensitivity to ammonia; it does not address Shriver's mental condition; nor does it describe the mechanism how low dose exposures to ammonia, after the accident, exacerbated Shriver's mental condition. Dr. Snyder has admitted that his office is not equipped to evaluate industrial, toxic, irritant or allergic mechanisms. (Third Circuit Appendix, p. 173a)

GAF Corporation also points to the several Worker's Compensation claims filed by Shriver.

(GAF's Third Circuit Brief, pp. 21-22, 30) However, the 1984 claim involved only the initial exposure experienced by Shriver as a result of the original accident, when he was exposed to a large quantity of anhydrous ammonia. With respect to the second claim, on December 18, 1985, the U.S. Department of Labor, Office of Workers Compensation Programs, informed Shriver that:

> "This office has accepted that you sustained chemical pneumonitis/bronchitis due to your exposure to ammonia on March 5, 1984. However, the medical evidence indicates that this condition resolved on or about April 7, 1984. This determination was based on the fact that there is no documented evidence of respiratory problems on the doctor's visit on or about April 7, 1984 and the respiratory testing in 1985 failed to confirm any damage." (Third Circuit Appendix, p. 172a)

The 1986 claim was based upon Dr. Snyder's mistaken belief that Shriver may have been suffering from allergies. Neither the 1984, 1985, or 1986 Workers Compensation claims involved any allegations that subsequent re-

exposures to ammonia were exacerbating Shriver's mental condition. (That was not known at that time.) The 1986 claim, like the 1985 claim, was rejected by the Office of Workers Compensation Programs because no causality could then be shown between Shriver's symptoms and his work environment, i.e. exposure to ammonia.

It was after Workers Compensation rejected the 1986 claim that Shriver sought evaluation from Johns Hopkins. It was then that Dr. Rivera correctly diagnosed Shriver's problem as hypersensitivity to ammonia and Dr. Fuhrmann later confirmed that diagnosis.

Finally, GAF Corporation cites several letters between Shriver and his attorney, David S. Keller, as evidence that Shriver was advised of a potential products liability claim and failed to file one. (GAF's Third Circuit Brief, pp. 15-16) However, in 1985/1986 when those letters were written by Attorney Keller, no one knew that Shriver had developed a hypersensitivity to ammonia as a result of the March 1984

accident, or that as a result of the hypersensitivity, subsequent lower dose exposures to ammonia were exacerbating his mental condition. Also, the Department of Labor had twice rejected Shriver's claims for Worker's Compensation (1985 and 1986) due to Shriver's inability to establish causality between his symptoms and his work environment.

Because the Department of Labor twice rejected Shriver's claim for Worker's Compensation due to Shriver's inability to establish causality, it was reasonable for Shriver to conclude that any suit filed against GAF Corporation at that time would meet a similar fate. Since Shriver had received compensation from the Department of Labor on the 1984 claim for the time that he lost due to the initial exposure to ammonia, he had no incentive to sue GAF Corporation. See Pierce v. Johns-Mansville Sales Corp., 464 A. 2d at 1027 ("Upon diagnosis of an initial illness, such as asbestosis, the injured party may not need or

desire judicial relief. Other sources, such as Worker's Compensation, or private insurance may provide adequate recompense for the initial ailment.")

Shriver's Knowledge of Manufacturer Wrongdoing or Product Defect

Shriver has alleged that the injuries that he suffered were the direct and proximate result of GAF Corporation's negligence, which consisted of the following breaches of duty:

> "a) In failing to provide adequate warning to Plaintiff and/or his employer about developing a hypersensitivity to the smell of ammonia, or to the strong odor of other chemicals from acute uncontrolled exposure;
>
> b) In failing to provide adequate warning to Plaintiff and/or his employer of the dangers of all further exposures to the smell of ammonia fumes in any amount, or to the strong odor of other chemicals, where such hypersensitivity to ammonia has developed." (Complaint, Paragraph 28 (a) and (b)) [Third Circuit Appendix, p. 6a]

Under Maryland law, the duty to warn is

limited to those dangers that GAF Corporation knew or should have known about during the time Shriver was exposed to ammonia. Ferebee v. Chevron Chemical Co., 736 F. 2d 1529, 1536 (D.C. Cir. 1984); Chambers v. G. D. Searle & Co., 441 F. Supp. 377, 381 (D. Md. 1975), aff'd, 567 F. 2d 269 (4th Cir. 1977)

It is generally held that in an action against the manufacturer or seller based upon negligent failure to warn, no liability is imposed upon the manufacturer or seller where the product is harmless to normal persons and the injury from the use of the product is attributable exclusively to hypersensitiveness or allergy. 2 R.D. Hursh & H.J. Bailey, American Law of Products Liability, Section 12.4 (2d Ed. 1974) However, this rule includes a caveat that there must be an absence of knowledge on the part of the manufacturer or seller that some people might be injured by the use of the product. Id. Stated another way, if the particular injury is reasonably foreseeable,

however rare, the manufacturer or seller has the duty to warn. Billiar v. Minnesota Mining and Manufacturing Co., 623 F. 2d 240, 246 (2nd Cir. 1980); and Ferebee v. Chevron Chemical Co., 552 F. Supp. 1293 (D.D.C. 1982)

There are three reasons why Shriver's receipt of the medical reports from Dr. Rivera and Dr. Fuhrmann mark the point at which he had knowledge of possible manufacturer wrongdoing or product defect:

1. Shriver did not know that he had developed a hypersensitivity to ammonia until he received Dr. Rivera's report;

2. Dr. Rivera's report states that:

> "It is not unusual for individuals who experience acute, uncontrolled exposures to industrial chemicals to develop psychiatric symptomatology following exposure. This was first described following ammonia exposure in 1938 where 2/6 reported cases had anxiety symptoms persisting for extended periods of time." (Third Circuit Appendix, p. 17a)

3. Dr. Fuhrmann's report states:

> "In my own practice I am currently

> following two patients who have developed hypersensitivity to ammonia fumes when utilizing the same piece of equipment in this claim, one is an employee of the manufacturer and the other is an end user.* * * * In my experience as an occupational physician I have seen numerous cases of individuals who have been exposed to fumes who later on developed a generalized 'hypersensitivity' to other fumes and strong odors." (Third Circuit Appendix, p. 27a)

A manufacture has the duty to possess expert knowledge in the field of its product. Tucson Industries, Inc. v. Schwartz, 108 Ariz. 464, 501 P. 2d 936 (1972)

Based upon the information contained in these two medical reports, Shriver commenced the within products liability action. Because Summary Judgment was granted before the parties had an opportunity to complete discovery, Shriver does not know the extent of GAF Corporation's actual knowledge concerning the dangers of hypersensitivity to ammonia. But, considering the information contained in these said medical reports, GAF Corporation should have known of those dangers, and thus had a duty

to warn Petitioner. Ferebee v. Chevron Chemical Co., supra; Chambers v. C. D. Searle & Co., supra.

CONCLUSION

For the above stated reason a Writ of Certiorari should issue in this case.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-5438

GLENN M. SHRIVER,
Appellant

v.

GAF CORPORATION

Appeal from the United States District Court for the Middle District of Pennsylvania
D.C. Civ. No. 90-00762
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit Rule 12(6)
November 1, 1991

Before: GREENBERG, ALITO, and ROSENN, Circuit Judges

JUDGMENT ORDER

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submit-

ted under Third Circuit Rule 12(6) on November 1, 1991.

The sole issue on appeal is whether the district court erred in granting defendant's motion for summary judgment on the ground that the Pennsylvania statute of limitations barring personal injuries after two years is applicable, and that even if the Maryland three-years statute of limitations applied, as contended by the appellant, it too bars this action.

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that for the reasons set forth in the opinion of the district court the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT:

_____
J.

Attest:

_____
Sally Mrvos, Clerk

Dated: Nov. 7, 1991

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 91-5438

GLENN M. SHRIVER,
Appellant

v.

GAF CORPORATION

On Appeal from the United States District Court for the Middle District of Pennsylvania
D.C. Civ. No. 90-00762

SUR PETITION FOR REHEARING

PRESENT: SLOVITER Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and ROSENN, Circuit Judge

The petition for rehearing filed by the appellant in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other

available circuit judges of the court in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT:

_____
Circuit Judge

Dated: Dec. 4, 1991

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GLENN M. SHRIVER, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-90-762
GAF CORPORATION, Defendant	:	

M E M O R A N D U M

On April 17, 1990, plaintiff, Glenn M. Shriver, filed this negligence action pursuant to 28 U.S.C. Section 1331 and Section 1332. The complaint alleges that plaintiff was injured after being exposed to excessive amounts of anhydrous ammonia which leaked from a copying machine manufactured by defendant, GAF Corporation. Defendant has filed a motion for summary judgment, asserting that plaintiff's claim is time-barred by the applicable two-year statute of limitations. This is a diversity case controlled by Pennsylvania law and the

motion will be evaluated under the well established standard. See Williams v. West Chester, 891 F. 2d 458 (3rd Cir. 1989).

First, plaintiff contends that the Maryland statute of limitations applies in this case because all substantive matters must be determined by the laws of the jurisdiction in which an injury occurred.[1] We agree with plaintiff that when a party is injured on federal property, the substantive law, but not the procedural law, of the state surrounding the federal property must prevail. 16. U.S.C. Section 457. Quadrini v. Sikorsky Aircraft Div. United Aircraft Corp., 425 F. Supp. 81 (D. Conn. 1977) on reconsideration on other grounds, 505 F. Supp. 1049 (1981). However, plaintiff overlooks relevant Maryland precedent which holds that the statute of limitations is a procedural matter governed by the law of the

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[1] Plaintiff was working at Fort Ritchie, Maryland, a United States Army base, at the time of the accident in question.

forum. See Doughty v. Prettyman, 219 Md. 83, 148 A. 2d 438 (1959)[2]

The facts averred by plaintiff are as follows. Plaintiff was employed by the United States Army as a graphic illustrator whose work required that he regularly use a copying machine manufactured by defendant. The machine utilizes anhydrous ammonia in the copying process and under normal conditions emits small amounts of ammonia fumes. On March 5, 1984, plaintiff was attempting to replace ammonia-filled cylinder when a pressure valve malfunctioned, causing the release of an unknown amount of ammonia. Plaintiff was exposed to high doses of the ammonia for a period of one and a half to two hours, until he repaired the leakage. Thereafter he was able to leave the closed environment and clean the ammonia from his

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[2] We note that if the Maryland three-year statute of limitations were to apply to this action, the outcome would not change. Plaintiff was put on notice of the cause of his injuries at least as early as 1986.

person.

Within a week of the accident plaintiff consulted several physicians complaining of headaches, nausea, vomiting, burning chest, throat and eyes, itchy skin, coughing, sneezing, respiratory and pulmonary problems, dizziness, etc. The physicians concluded that plaintiff's symptoms were caused the March 5th accident. After a month or so the initial problems appeared to diminish. Plaintiff returned to work and continued to use the defendant's machine, which as indicated, regularly emitted ammonia fumes. In the two years following the 1984 accident, plaintiff continued to suffer symptoms of a chemical pneumonic/bronchitis, as well as an exacerbation of a pre-existing mental condition. Plaintiff consulted various physicians during that period, who diagnosed him as suffering from bronchitis and other respiratory ailments, which they believed were aggravated by his exposure to ammonia. Plaintiff contends that none of these physicians

explicitly related his ongoing problems to the 1984 accident, but rather classified his illness as an allergy to ammonia. Eventually, plaintiff was advised by one physician that his daily exposure to ammonia was detrimental to his health and that he should resign from his job, which he did in 1986. It was not until 1988, that plaintiff was diagnosed as having sustained what was termed a "hypersensitivity" to ammonia, which was directly and proximately caused by the 1984 accident. This hypersensitivity is a psychosomatic reaction to ammonia which caused plaintiff to become ill whenever he was exposed to ammonia.

There is no dispute that plaintiff was aware that he was injured in 1984, that his injury was caused by defendant's alleged negligence, or that his respiratory problems were aggravated by his exposure to low doses of ammonia between 1984 and 1986. However, plaintiff argues that prior to 1988 he did not know that his ongoing reaction to ammonia was actually caused by the

1984 accident. Plaintiff claims that the physicians who examined before 1988, only diagnosed an allergy to ammonia, without definitively linking the onset of this condition to his initial exposure to the large amount of ammonia in 1984. For this reason, plaintiff contends that his claim is not barred by the statute of limitations.

In Pennsylvania, the statute of limitations for personal injury claims is "two years from the time that injury was done." 42 Pa. C.S.A. Section 5524(2). The "injury is done when the act heralding a possible tort inflicts damage which is physically objecti[ve] [sic] and ascertainable." Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1072 (M.D. Pa. 1988) (citations omitted); see Merry v. Westinghouse Electric Corp., 684 F. Supp. 852, 854 (M.D. Pa. 1988). Under what is known as the discovery rule, the statutory period commences when a plaintiff knows or reasonably should have known of the cause of his or her injury. Bayless v.

Philadelphia National League Club, 579 F. 2d 37, 39 (3d Cir. 1978) At that point "[t]he burden is on an injured party once he discovers the cause of his injuries to determine within the statutory period the party's whose negligence or breach of duty were responsible for the event or condition." Piccolini, supra, 686 F. Supp. at 1071-1072.

The crux of plaintiff's argument is that he did not know "to a reasonable degree of medical certainty" until 1988 that he was actually hypersensitive, rather than merely allergic, to ammonia.[3] Plaintiff further contends that the aggravation of his symptoms by daily exposure to ammonia was a separate and distinct injury from the initial injury of 1984.

We conclude that plaintiff has misconstrued

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[3] For purposes of this action, the distinction between hypersensitivity and allergy is that a hypersensitivity is a condition caused by an acute exposure to ammonia, which in this case involves a tortious act. An allergy, not necessarily linked to an acute exposure, is an adverse reaction to ammonia.

the law to the issues presented by this matter. "[O]nce [a plaintiff] possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim." Piccolini, supra, 686 F. Supp. at 1073 (citations an emphasis omitted). Moreover, when an action is discoverable a claimant "may not then sleep on that cause of action until further injuries appear. An injured party may not unduly postpone an action until the full extent of his damage is ascertained." Place v. Ortho Pharmaceutical Corp., 595 F. Supp. 1009, 1012 (W.D. Pa. 1984), quoting Shadle v. Pearce, 287 Pa. Super. 436, 441, 430 A. 2d 683, 686 (1981).

Not only did plaintiff know that he was injured by defendant's alleged tortious conduct in 1984, plaintiff also had reason to know that the accident caused his recurring symptoms in the ensuing years. Several physicians who examined plaintiff prior to 1986, agreed that his adverse reaction to ammonia would not have

occurred but for the initial exposure in 1984. for example, on september 26, 1986, a letter by an examining physician, Dr. Snyder, stated:

> [Plaintiff] claimed good health until 5 March, 1984, when he was exposed to extremely high concentrations of anhydrous ammonia at work. Since then, he claimes [sic] multiple symptoms outlined in the enclosed self history, and addendum, on a perennial basis. Some of his symptoms are as follows: Excessive sneezing and drainage, nasal stuffiness, particularly after exposure to various chemicals at work, associated dizziness and ear ringing, eye burning, itching, and swelling, generalized headache, nausea and abdominal distress, lightheadedness, fuzzy vision, and sometimes 'a feeling of collapse. The chemicals he used frequently at work involved anhydrous ammonia... "Diagnoses: 1. Rhinitis, primarily due to irritant chemicals and minimally due to inhalant allergy. 2. Tracheobronchitis, due to irritant in chemicals, with history of obstructive defect." (emphasis added).[4]

Dr. Snyder indicates quite clearly that plaintiff's reactions to ammonia did not begin until after his initial exposure in 1984, and

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[4] Plaintiff admits in deposition that "irritant chemicals" refers to the ammonia from defendant's copy machine.

plaintiff knew that he did not react to ammonia fumes until his 1984 accident.[5] Plaintiff informed to several physicians and admitted in deposition that he believed he had "recurring symptoms...following his anhydrous ammonia accident in March, 1984." He also stated that he felt better whenever he was away from work for an extended time, and as already noted, plaintiff resigned his job based upon medical advice that continuous exposure to ammonia was harmful.

Upon close examination of plaintiff's deposition, medical records, and correspondence with attorneys, we conclude that plaintiff knew, or certainly had reason to know, that he suffered a recurring reaction to ammonia (regardless of the label) which would not have

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[5] In 1987 plaintiff was diagnosed by Dr. John E. Farmer as follows: "On view of this and Mr. Shriver's history, namely that prior to the ammonia accident he was asymptomatic, it seems that his allergic problems are a direct result of his 1984 accident and re-exposure."

occurred but for the initial accident. Plaintiff is not required to know the precise classification of his illness before he can be charged with having the requisite knowledge that he sustained an actionable injury. Plaintiff points exclusively to the 1988 report of Dr. J.C. Rivera as the first source which links his symptoms to the initial and acute exposure to ammonia. Dr. Rivera stated: "It is not unusual for individuals who experience acute, uncontrolled exposures to industrial chemicals to develop psychiatric symptomatology following the exposure." This report is markedly similar to Dr. Snyder's comment in 1985 that "those who have greater symptomatology" when exposed to chemicals in an occupational setting, "seem to have associated factors such as severe acute exposures."

On three separate occasions plaintiff filed worker's compensation claims, each time revealing his knowledge of his injury and its cause. The first application was filed in 1984,

in which he claimed "severe over-exposure to lungs, exposed skin areas from anhydrous ammonia" which was caused by the malfunctioning of an ammonia tank which "allow[ed] vaprs [sic] to escape toxifying [plaintiff]." In May, 1985, in applying for occupational disease compensation, plaintiff was asked to state the "date [he] first realized the disease or illness was caused or aggravated by [his] employment." The response stated:

> 5 March 84, Anhydrous ammonia accident, 6 March 84, x-rays, Medical Evaluation shows bronchial lung damage, 5 March, to present have recurring respiratory problems (bronchitis, acute [sic] and chronic, chemical) 3/5/84 30% lung capacity loss.

In the section entitled "Nature of disease or illness," plaintiff stated: "Bronchitis, recurring, acute and chronic (chemically induced from place of duty.)" Finally, in 1986, plaintiff sought compensation for a "reoccurrence of sickness from ammonia" in which he referred to the date of his original injury as "03/05/84)." These applications coupled

with physicians's reports reveal that plaintiff unequivocally knew, by 1986 at the latest, that his continuing symptoms were caused by the 1984 incident. The knowledge disclosed in plaintiff's claims for worker's compensation was more than sufficient for him to be aware that a negligence claim could be made for the same injuries.

Finally, the evidence that best indicates that prior to 1988 plaintiff knew or should have known he had a cause of action against defendant is a letter to plaintiff from attorney David S. Keller, dated March 7, 1985. Keller reviewed the chronology of plaintiff's illnesses with respect to "[his] exposure to ammonia in the course of [his] employment" and stated:

> I discussed with you the possibility of a potential products liability action against the manufacturer/distributor of the machine at which you were working during the period of time that you were exposed to the ammonia fumes. If this machine was defective in its design or manufacturer, or if the manufacturer/ distributor failed to give adequate warnings as to the proper use and maintenance of the machine, there may be a

> potential action. You should be aware that such an action must be filed within a definite period of time of your discovery of the injuries to you.

Keller again wrote plaintiff on June 26, 1986, and addressed plaintiff's potential product liability action:

> I believe that you had at least a potential products liability action against the manufacturer/distributor of the Ozalid machine, which apparently malfunctioned in some way exposing you to the ammonia fumes. However, it is possible that you have allowed the Statute of Limitations to run, as you did not get back to me until after a year.. In short, because you expressed no interest in pursuing a product liability claim within the Statute of Limitations,, it is doubtful that I can do anything to assist you. (emphasis added)

Even if plaintiff arguably did not know at this point that he had a cause of action, an attorney's knowledge of the cause of an injury may be imputed to the plaintiff. Owens v. Lac D'Amiante du Quebec, Ltee., 656 F. Supp. 981 (E.D. Pa. 1987) Aff'd 833 F. 2d 306 (3rd Cir. 1987).

Plaintiff's first rebuttal of these matters is that he did not know of the cause of his recurring symptoms to a reasonable degree of medical certainty before 1988. We recognize that some courts have held that when a tentative diagnosis is not confirmed until a later date, the limitations period does not commence until a claimant is given a firm diagnosis. Trieschock v. Owens Corning Fiberglas Co., 354 Pa. Super. 263, 511 A. 2d 863 (1986); Nelson v. Industrial Com., 120 Ariz. 278, 585 P. 2d 887, 891 (App. 1978); Blue Diamond Coal v. Pannell, 203 Va. 49, 122 S.E. 2d 666 (1961). However, the above precedent, which is of doubtful validity, is inapplicable to the facts in this case. First, the diagnosis made by plaintiff's physicians between 1984 and 1986 were not tentative, but clearly concluded that plaintiff was suffering a negative reaction to ammonia and that he should avoid all exposure to the substance. Each physician acknowledged that plaintiff's symptoms would not have occurred but

for the 1984 accident. It is irrelevant that the physicians did not define plaintiff's reaction to ammonia as a "hypersensitivity" rather than an allergy, because the symptoms, injury, cause, and effect were identical to those in the 1988 report, which plaintiff contends was the first diagnosis.

Second, plaintiff's primary contention is that he was unaware of what could happen to his health if he as re-exposed to low doses of ammonia after the initial exposure. However, this contention is refuted by the fact that plaintiff was advised to resign his job in 1986 because of the detrimental effect ammonia was having on his condition. On this basis it is clear that the statute of limitations should begin in 1986.

Moreover, the Eastern District of Pennsylvania has criticized the firm diagnosis requirement. In Souders v. Atlantic Richfield Co., 746 F. Supp. 570, 573 (E.D. Pa. 1990), the claimant, like plaintiff in the instant case,

alleged that the cause of action did not accrue until he was positively and finally diagnosed as having asbestosis. The defense argued that the cause of action accrued several years earlier, when the plaintiff was informed that his illness was asbestos-related even though the plaintiff did not credit that diagnosis. The Court agreed and held that the plaintiff possessed sufficient facts to put him on notice that he had an injury which was caused by his exposure to asbestos. The plaintiff's knowledge that his illness was asbestos-related, regardless of its medical definition, was sufficient. "[S]o long as the claimant is aware that he has an injury there is no requirement that he be aware of a precise diagnosis as some language seems to suggest." Id. at 576 (citations omitted). See also Connaught Laboratories, Inc. v. Lewis, 124 Pa. Cmwlth. 568, 557 A. 2d 40, 46 (1989) (plaintiff need not know the precise nature of his injury, only that the injury occurred and was caused by some wrongful

conduct).[6]

A more difficult issue is whether plaintiff's hypersensitivity is a "separate and distinct" injury from his initial respiratory problems. We recognize that a statute of limitations may begin to run upon the manifestation of a later and distinct injury, but only if such injury results from a separate tortious cause. Cathcart v. Keene Industrial Insulation, 324 Pa. Super. 123, 471 A. 2d 493, 506 n. 13 (1984); Shadle v. Pearce, 287 Pa. Super. 436, 430 A. 2d 683, 685-86 (1981); Bayless, supra, 579 F. 2d at 39. In the present action, the tortious cause in question consists of malfunctioning of defendant's copy machine, coupled with a failure

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[6] The Court in Souders criticized the reasoning in Trieschock, supra, as did the Pennsylvania Superior Court in Ackler v. Raymark, 380 Pa. Super. 183, 551 A. 2d 291, 296-97, n. 3 (1988). Trieschock applied a medical standard to determine when to commence the limitations period. The law requires only that a claimant have sufficient facts to be put on notice that he suffers an illness, whereas doctors must be more certain to express a medical opinion.

to warn of the danger of acute ammonia exposure. This is the only causation which plaintiff relates to his injuries. Plaintiff does not assert that the daily emission of low doses of ammonia was a result of negligence. Rather, these emissions were normal. Thus, there is no new or continuous negligence which would provide a new statutory period for plaintiff's claim of hypersensitivity.

A claimant is "not entitled to a new limitations period to begin with the appearance of each new injury or complication," when they have knowledge of the initial tortious conduct. Place, supra, 595 F. Supp. at 1012. "[A] new limitation period does not start each time a new disease develops from the same tortious conduct of the defendant." Staiano v. Johns-Manville Corp., 304 Pa. Super. 280, 294, 450 A. 2d 681 (1982). Rather, "once the statute of limitations begins to run on an injury claim it also runs with respect to related injuries arising from the same negligent conduct, even if the

the related injuries are not immediately ascertainable." Orozco v. Children's Hospital of Philadelphia, 638 F. Supp. 280, 282 (E.D. Pa. 1986, aff'd 813 F. 2d 398 (3d Cir. 1987). Finally, "in Pennsylvania, a plaintiff's claim for all injures arising out of the same tortious conduct of a defendant must be brought within two (2) years of the time that the plaintiff knows, or in the exercise of reasonable diligence should know, of his initial injury, and that the injury was caused by another's wrongful conduct." Cathcart, supra, 471 A. 2d at 507 (emphasis added) (there must be a new or continuous negligence on the part of defendant to allow a "separate and distinct injury" claim).

Alternatively, plaintiff argues that the untimeliness of the complaint with regard to his chemical pneumonitis/bronchitis condition (physical reaction to ammonia), does not bar his claim of exacerbation to his mental condition, which he alleges was a separate and distinct

injury not discovered until 1988. Plaintiff cites Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 464 A. 2d 1020 (1983), in which the court held that when a cause of action concerns a separate and distinct latent disease, and no tort recovery has been sought for the initial injury, the action accrues at the time the latent injury reasonably should have been discovered. However, Maryland law also holds that the statute begins to run on a latent disease when a claimant gains knowledge sufficient to put her on inquiry." Lutheran Hospital v. Levy, 60 Md. App. 227, 482 A. 2d 23, 29 (1984).

Plaintiff contends that the affect of ammonia on his pre-existing psychological disorder of post traumatic stress syndrome was not definitively diagnosed until 1988. However, between 1984 and 1987, plaintiff's physicians observed and noted a deterioration in his mental condition in conjunction with his symptomatology from ammonia exposure. Several doctors conclud-

ed that plaintiff's psychiatric condition was "intimately related" to his physical symptoms. Plaintiff refers to a 1988 physician's report which gives a detailed analysis concerning the psychosomatic nature of his hypersensitivity to ammonia, as well as the aggravation of his psychological condition. However, the report acknowledges that similar diagnoses have been made by plaintiff's former physicians.[7] Thus, we find that plaintiff was on notice, prior to 1988, that his pre-existing mental condition was aggravated by exposure to ammonia.

We conclude that plaintiff's complaint is untimely and must be dismissed. Plaintiff suffered an ascertainable and actionable injury in 1984, and knew or had reason to know that his recurring symptoms arose from that incident. Whether the doctors in the past used the term

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[7] The 1988 report stated: "As with the previous physicians who have seen [plaintiff], we feel that his predominant disorder is psychiatric, and this should be adequately addressed and treated." (emphasis added).

"hypersensitive" in their conclusions is of no consequence, for the substance of each diagnosis was the same--that plaintiff reacted negatively, both psychologically and physically, to ammonia fumes and that his ongoing problems were due to the 1984 accident.

An appropriate order will issue.

William W. Caldwell
United States District Judge

Date: April 24, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GLENN M. SHRIVER, Plaintiff	:	
vs.	:	CIVIL ACTION NO. 1:CV-90-762
GAF CORPORATION, Defendant	:	

ORDER AND JUDGMENT

AND NOW, this 24th day of April, 1991, upon consideration of defendant's motion for summary judgment, it is ordered that:

1. Defendant's motion for summary judgment is granted.

2. Judgment is entered in favor of defendant and against plaintiff.

3. The Clerk of Court shall close this file.

William W. Caldwell
United States District Judge

Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

No. 91-1500

In The

Supreme Court of the United States

October Term, 1991

GLENN M. SHRIVER,

Petitioner,

vs.

GAF CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit where there are no federal questions and no conflicting appellate decisions implicated in the district court's determination that an action brought more than six years following an injury is barred by the statute of limitations.

2. Whether this Court should issue a writ of certiorari to the United States Court of Appeals for the Third Circuit where the Court below held that Petitioner's action, commenced more than six years following an injury, is time barred regardless of whether the Pennsylvania two-year or Maryland three-year statute of limitations was applicable.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are the petitioner, Glenn M. Shriver, and the respondent, GAF Corporation.

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No. 91-1500

In The

Supreme Court of the United States

October Term, 1991

GLENN M. SHRIVER,

Petitioner,

vs.

GAF CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent GAF Corporation ("GAF") respectfully opposes petitioner's writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the Court of Appeals for the Third Circuit dated December 4, 1991, denying rehearing, has not been reported. It is reproduced in Petitioner's Appendix B ("Pet. App. B").

The Judgment Order of the Court of Appeals for the Third Circuit dated November 7, 1991 has not been reported. It is reproduced in Petitioner's Appendix A ("Pet. App. A"). The Opinion of the United States District Court for the Middle District of Pennsylvania dated April 24, 1991 has not been reported. It is reproduced in Petitioner's Appendix C ("Pet. App. C").

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Pennsylvania Statute involved, 42 Pa.C.S.A. Section 5524(2) is set forth in petitioner's brief at p. 4. The Maryland Statute involved, Maryland Code (1984), Courts and Judicial Proceedings, Section 5-101 is set forth in petitioner's brief at pp. 3-4. The Federal Statute involved, 16 U.S.C. Section 457 is set forth in petitioner's brief at p. 3. Federal Rule of Civil Procedure 41(b) is set forth in petitioner's brief at p. 7.

STATEMENT OF THE CASE

This case involves a claim for personal injuries instituted in the United States District Court for the Middle District of Pennsylvania (the "district court") more than

six years following the date of injury. On or about April 17, 1990, Petitioner, Glenn M. Shriver ("Shriver"), filed this products liability action against Respondent, GAF Corporation ("GAF"), alleging that he was over-exposed to ammonia fumes at his work place on or about March 5, 1984. Shriver also claims the exposure caused him to develop hypersensitivity to ammonia fumes.

Following discovery, which included a review of Shriver's medical and employment records, workmen's compensation documents, letters from his prior attorney, Answers to Interrogatories and the deposition testimony of Shriver; GAF filed a Motion for Summary Judgment because Shriver's claims were barred by both the Pennsylvania two-year and Maryland three-year statutes of limitations.

On April 24, 1991, the district court entered an Order and Judgment granting GAF's Motion for Summary Judgment. The district court found that Shriver suffered an ascertainable and actionable injury in 1984, and knew or had reason to know that his recurring symptoms arose from that incident. On May 23, 1991, Shriver appealed the April 24, 1991 Order and Judgment to the United States Court of Appeals for the Third Circuit (the "Court of Appeals"), which affirmed on November 7, 1991, "for the reasons set forth in the opinion of the district court." Pet. App. A-2. The same court denied Petitioner's motion for rehearing on December 4, 1991. Pet. App. B-2. This petition for writ of certiorari followed.

Respondent hereby adopts the recitation and application of the facts set forth in the district court's opinion, Pet. App. C. Respondent believes Petitioner inaccurately

represents to this Court that doctors were unable to establish the cause of Petitioner's illness until April 19, 1988. Although Shriver did not file a Complaint against GAF alleging he was over-exposed to ammonia fumes from a GAF blueprint copy machine until April 17, 1990, Shriver admitted his exposure to ammonia fumes occurred at his workplace more than six years prior to filing this lawsuit, beginning on March 5, 1984. Pet. App. C-10. As a result of this over-exposure, Shriver developed immediate symptoms including burning eyes, burning skin, dizziness, a feeling of collapse, itchiness, choking feeling and a feeling of fire in his lungs which were diagnosed by various physicians and labeled hypersensitivity to ammonia fumes. Shriver knew his injury was related to his ammonia exposure of March 5, 1984 when, on March 21, 1984 he filed a Federal Employee's Notice of Traumatic Injury and Claim for Continuation of Pay/ Compensation with the U.S. Department of Labor. He also knew of his potential claim against GAF by March 27, 1985, when his attorney advised him that the claim must be timely filed.

In an attempt to avoid the statute of limitations bar, Shriver claims that although his symptomatology was continuous, ongoing and the direct and proximate result of the March 5, 1984 exposure, the statute did not begin to run until April 19, 1988, a date when he claims to have learned his condition was labeled "hypersensitivity to ammonia." As the district court stated, "there is no dispute that plaintiff was aware that he was injured in 1984, that his injury was caused by defendant's alleged negligence, or that his respiratory problems were aggravated by his exposure to low doses of ammonia between 1984

and 1986," Pet. App. C-5. The district court found, after "close examination of the deposition, medical records, and correspondence with attorneys" that Shriver "knew, or certainly had reason to know, that he suffered a recurring reaction to ammonia (regardless of the label) which would not have occurred but for the initial accident." Pet. App. CIO-II.

As the petitioner knew or should have known of his illness and his right to sue by 1984, or by 1986 at the latest, his suit filed in 1990 is time barred, regardless of whether the Pennsylvania two year statute of limitations or the three year Maryland statute of limitations applies.

REASONS FOR DENYING WRIT

A review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons therefore." Rule 10.1, Supreme Court Rules. In this case, a writ of certiorari should be denied because there is no substantial federal question which requires determination. There is no conflict among the Courts of Appeal, and the Court of Appeals below did not decide a federal question in a manner conflicting with any decisions of this Court.

The decision of the United States District Court for the Middle District of Pennsylvania, affirmed by the Appellate Court, is in accord with the decisions of other district courts in finding that when a party is injured on federal property, the *substantive* law, but not the *procedural* law, of the state surrounding the federal property must prevail. There are no principles important to the

public which must be settled here, and no substantial federal questions to resolve.

Furthermore, the state law grounds for judgment, namely that the Petitioner's action is barred by both the Pennsylvania and Maryland statutes of limitations, is an independent and adequate ground for determining the issue. Specifically, because Petitioner's claim is barred regardless of whether the Pennsylvania or the Maryland statute of limitations is applicable, a determination that federal law does or does not require the application of either Pennsylvania or Maryland's statute of limitations will not impact the outcome of the case. Therefore, any determination of a purported Federal question will effectively be advisory only.

I. There are no "special and important" reasons for granting the writ of certiorari.

A review on writ of certiorari is a matter of judicial discretion, and will be granted "only when there are special and important reasons therefore." Rule 10.1, Supreme Court Rules. These "special and important reasons" include a conflict between United States courts of appeal on the same matter; a conflict between a state court of last resort and a United States court of appeals; when a state court or United States court of appeals decides a question of federal law in a way which conflicts with an opinion of the United States Supreme Court; or where a United States court of appeals has decided an important question of federal law which "should" be settled by the United States Supreme Court. Rules 10.1(a)-(c), Supreme Court Rules. Although the list is not

exhaustive, none of these issues is present in this case, and petitioner asserts no other reason that this Court should grant a writ of certiorari. As stated by Mr. Chief Justice Taft, speaking for a unanimous Court,

> . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which are important to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion between the Circuit Courts of Appeals." *Rice v. Sioux City Memorial Park Cemetery*, 75 S.Ct. 614 (1955), citing *Lavne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 43 S.Ct. 422, 423, 67 L.Ed. 2d 712.

Petitioner admits in his brief that there is no conflict on this issue in the district courts, and no conflicting authority on the issue in the Courts of Appeal. Petitioner's brief at page 19. Petitioner asserts no public principle of great importance which needs to be or which ought to be settled. The only purpose of this petition for writ of certiorari is an attempt by the Petitioner to avoid the bar of the statute of limitations on his personal injury claim.

II. A district court sitting in diversity applies the forum's choice of law rules in determining the applicable statute of limitations.

It is undisputed that a district court sitting in diversity applies the forum's choice of law rules in determining the applicable statute of limitations in an action under 16 U.S.C. Section 457. The law of diversity jurisdiction

states that, "a federal court, sitting in diversity, follows the forum's choice of law rules to determine the applicable statute of limitations." *Guaranty Trust Co. v. York*, 326 U.S. 99, 65 S.Ct. 1464, 189 L.Ed. 2079 (1945); *Ross v. Johns-Manville Corp.*, 766 F.2d 823 (1985); and *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir. 1980), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed. 2d 237 (1980). Consistent with that principle, the district court applied the Pennsylvania statute of limitations because under both Pennsylvania and Maryland law the statute of limitations is procedural.[1]

Thus, under diversity jurisdiction, the statute of limitations of the forum (Pennsylvania) applies to this case. Furthermore, even if a federal question was at issue, Pennsylvania's statute of limitations would apply. "Generally, when Congress has created a federal right but not prescribed a period for its enforcement, federal courts will borrow the most closely analogous statute of limitations of the state in which the federal court sits . . . " *Quadrini v. Sikorsky Aircraft Division*, 425 F. Supp. 81 (D. Conn. 1977), on reconsideration on other grounds, 505 F.2d 1049 (1981), citing *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (1975) and other cases. Although in his brief at page 20, petitioner contends that *Quadrini* is erroneous, Petitioner then states

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[1] By convoluted reasoning Shriver attempts to convince this court to ignore the law of Maryland by suggesting F.R.C.P. 41(b) converts all statutes of limitation to substantive law. F.R.C.P. 41(b) applies to orders of dismissal and is for use when a plaintiff's right has been extinguished in one court and plaintiff then attempts to bring the same action in a second court.

at page 24 of his brief that "We do not quarrel with the holding of the *Johnson* case".

Even though Shriver admits that a federal court will generally apply the statute of limitations of the forum (i.e. Pennsylvania), he claims that 16 U.S.C. § 457 supports an argument that Maryland's statute of limitations nevertheless applies in this case. Shriver's position is unfounded. 16 U.S.C. Section 457 states that when a party is injured on federal property, the *substantive* law, but not the *procedural* law, of the state surrounding the federal property must prevail. *See Quadrini v. Sikorsky Aircraft Division*, 425 F. Supp. 81 (D. Conn. 1977), on reconsideration on other grounds, 505 F. Supp. 1049 (1981); *Reed v. Charizio*, 183 F. Supp. 52, 53 (E.D. Vp. 1960); *Morley v. Cohen*, 610 F. Supp. 798, 827 (D.C. Md. 1985).[2] Since Maryland law holds that a statute of limitation is procedural,[3] Shriver's argument must fail. As both Pennsylvania and

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[2] Furthermore, it appears that Petitioner accepts this as correct law. See District Court Opinion, Pet. App. C-2 ("We agree with plaintiff (i.e. petitioner) that when a party is injured on federal property, the substantive law, but not the procedural law, of the state surrounding the property must prevail.")

[3] As the district court stated "plaintiff overlooks relevant Maryland precedent which holds that the statute of limitations is a procedural matter governed by the law of the forum." Pet. App. C-2-3. Maryland's own position on this issue is carefully ignored by Shriver, because it is clear that Maryland recognizes that a statute of limitations is procedural and that, as to matters of procedural law, Maryland applies the law of the forum. *Doughty v. Prettyman*, 219 Md. 83, 88, 148 A.2d 438 (1959); *Morley v. Cohen, supra*, (Md. 1985); *Leonard v. Wharton*, 268 F. Supp. 715, 718 (D. Md. 1967), appeal dismissed, 396 F.2d 452 (4th Cir. 1968), *cert. denied*, 393 U.S. 1028, 89 S.Ct. 624, 21 L.Ed. 2d 571 (1969); *see also Mills v. International Harvester Co.*, 554 F. Supp. 611, 612 (D. Md. 1982).

Maryland consider statutes of limitation to be procedural, the district court was correct in applying the procedural (i.e. limitations) law of the forum, Pennsylvania. That decision is wholly consistent with existing law.

III. The Pennsylvania choice of law rules require the application of the Pennsylvania two-year statute of limitations, which bars petitioner's cause of action, as the injury was discovered or should have been discovered in 1984 or at latest by 1986, and suit was not filed until 1990.

The Pennsylvania statute of limitations for personal injury claims is "two years from the time that injury was done." 42 Pa. C.S.A. § 5524(2). The "injury is done when the act heralding a possible tort inflicts damage which is physically objecti[ve] [sic] and ascertainable." *Piccolini v. Simon's Wrecking*, 686 F. Supp. 1063, 1072 (M.D. Pa. 1988); *see also Merry v. Westinghouse Electric Corp.*, 684 F. Supp. 852, 854 (M.D. Pa. 1988).

Pennsylvania has adopted the discovery rule, which states that the statutory period commences from the time a plaintiff knows or reasonably should have known the cause of his or her injury. *Bayless v. Philadelphia National League Club*, 579 F.2d 37, 39 (3d Cir. 1978), aff'd. 615 F.2d 1352 (1980). Under the discovery rule, "[t]he burden is on an injured party once he discovers the cause of his injuries to determine within the statutory period the party's whose negligence or breach of duty were responsible for the event or condition." *Piccolini, supra*, 686 F. Supp. at 1071-1072. Pennsylvania applies a two year statute of limitations to personal injuries, and the statute begins to

run when the injured party knows or should know the cause of his or her injury.

The district court determined that Petitioner knew or should have known of his injuries by 1984 or by 1986 at latest.

The district court stated that:

> There is no dispute that plaintiff was aware that he was injured in 1984, that his injury was caused by defendant's alleged negligence, or that his respiratory problems were aggravated by his exposure to low doses of ammonia between 1984 and 1986.

Pet. App. C-5.

Shriver was advised by all of his treating physicians that his injuries were ammonia-related and that exposure to ammonia was detrimental to his health. Petitioner "informed several physicians and admitted in deposition that he believed he had 'recurring symptoms following his anhydrous ammonia accident in 1984' ". Pet. App. C-10. The district court found, after "close examination of the deposition, medical records, and correspondence with attorneys" that Shriver "knew, or certainly had reason to know, that he suffered a recurring reaction to ammonia (regardless of the label) which would not have occurred but for the initial accident." Pet. App. C-10-11. The Court further stated that the information admitted by Petitioner in his applications for occupational disease compensation "coupled with physicians's reports reveal that (petitioner) unequivocally knew, by 1986 at the latest, that his continuing symptoms were caused by the 1984 incident." Pet. App. C-12-13.

Shriver's testimony, medical records, letters from his attorney and workmen's compensation records on which the district court based its finding unalterably establish that Petitioner was on notice of his injuries and their cause by 1984, or by 1986 "at the latest".

IV. Even if the Maryland three year statute of limitations was to apply, the Petitioner's claim is still time barred.

There is no dispute that Maryland would apply a three year statute of limitations to a personal injury claim filed in its court. Maryland Code (1984), Petitioner's brief at pp. 3-4 ("a civil action shall be filed within three years from the date it accrues.") Clearly, the district court found that the cause of action accrued in 1984 or, "at the latest", by 1986. Therefore, the applicable Maryland statute also bars petitioner's claim, as the injury and its cause were discovered in 1984, or by 1986 at latest, and suit was not filed until 1990.

Whether Maryland or Pennsylvania procedural law applies, Petitioner's action is time barred. The district court found, as noted above, that Petitioner was or should have been aware of his injury by 1984, or by 1986, "at the latest". The Appellate Court affirmed the decision "for the reasons stated" by the district court. As 1986 predates the filing of the suit by more than three years, Petitioner is barred by both Pennsylvania's and Maryland's statutes of limitations.

V. The statute of limitations (whether Pennsylvania or Maryland) is an adequate and independent state law grounds dispositive of the issues, and thus any decision on a "federal question" would not be outcome determinative.

The principle that the Supreme Court will not review state court judgments resting on independent and adequate state grounds, even if those judgments also decide questions of federal law, applies whether the state law ground is substantive or procedural. *Coleman v. Thompson*, 111 S.Ct. 2546, 115 L.Ed. 2d 640 (1991); *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed. 2d 308 (reliance by state court on a procedural bar is permissible independent basis for disposition of case); *Henry v. Mississippi*, 379 U.S. 443, 13 L.Ed. 2d 408, 85 S.Ct. 564 (1965), *reh. denied*, 380 U.S. 926, 13 L.Ed. 2d 813, 85 S.Ct 878 (The Supreme Court will decline to review state court judgments which rest on independent and adequate state substantive or procedural grounds, even where those judgments also decide federal questions.); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 97 S.Ct. 2849 (1977) (United States Supreme Court has no jurisdiction to review decision of state court which rests on both federal and state grounds, either of which would be dispositive); *Hathorn v. Lovorn*, 457 U.S. 255, 102 S.Ct. 2421, 72 L.Ed. 2d 824 (1982) (failure to comply with a state procedural rule may constitute an independent and adequate state ground barring Supreme Court review of a federal question where the procedural rule is regularly followed).

For example, in *Coleman, supra*, this Court stated:

> This Court will not review a question of federal law decided by a state court if the decision of

> that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. . . . This rule applies whether the state law ground is substantive or procedural. (citations omitted).

115 L.Ed. 2d at 655. The *Coleman* Court then quoted from *Herb v. Pitcairn*, 324 U.S. 117, 125-126, 89 L.Ed. 789, 65 S.Ct 459 (1945):

> We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.

Although this principle is usually applied to state court and habeas corpus decisions, the same logic should apply in this case. Even if this Court were to determine that the district court was incorrect in applying Pennsylvania law, and its view of the federal law was "corrected" such that 16 U.S.C. section 457 required the application of Maryland procedural law, the same decision would be rendered by the court below. This is undoubted, because the Court's finding that petitioner had legal notice by 1984 or by 1986 "at the latest", assures that a suit brought in 1990, at least four years later, will be barred by a three year statute of limitations (Maryland's) the same as by a two year statute of limitations (Pennsylvania's).

Petitioner's petition for a writ of certiorari is nothing other than an attempt to seek relief from petitioner's failure to file a personal injury claim within the statutory period. Petitioner's claim is clearly barred whether Pennsylvania's or Maryland's statute of limitations applies

(and thus regardless of whether Petitioner could characterize Maryland's statute of limitations as somehow substantive). The only factor which could give relief to the petitioner is a factual finding by this Court that Petitioner did not know of his injuries until some date within the relevant statutory period (i.e. in 1988 or after). The district court found repeatedly that Petitioner knew of his injuries as of 1986, at latest, if not by 1984. The Appellate Court affirmed for the reasons stated by the district court. This Court will not generally review factual findings in which the district court and court of appeal concur. *Branti v. Finkel*, 100 S.Ct. 1287, 445 U.S. 507, 63 L.Ed. 2d 574, 580, fn. 6 (1980) (absent exceptional circumstances, it is settled practice of the Supreme Court to accept factual determinations in which the district court and the court of appeals concur.) The district court's findings in this case are "undisputed", and the Court of Appeals affirmed "for the reasons set forth in the opinion of the district court."

Petitioner's claim is time barred regardless of any determination this Court might make regarding any purported issue of federal law. This fact, along with the fact that the legal doctrines relied upon have not been attacked as faulty or in conflict with other decisions, makes this case an inappropriate case in which to grant a writ of certiorari. No special or important reasons, and in fact no federal question, exists. There is no reason in this case for a writ of certiorari to be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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